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CAVEAT EMPTOR AND THE PURE FOOD LAWS.

We were much interested in a recent public letter addressed by the Secretary of the American Fair Trade League to George W. Perkins of the New York Food Commission in answer to the latter's suggestion that the consumer purchase his food from bulk stocks and not in branded packages. The paragraph that particularly interested us reads as follows:

To the consumer, your proposal to buy nameless bulk merchandise means loss of a maker's guarantee of satisfaction and service; it means abandonment of all standards by which to measure values; it means rejection of all the gain the world has made in methods of barter and once more subjects the consumer to the dark-age law of *caveat emptor*—"Let the buyer beware."

"The dark-age law of *caveat emptor!*" Ye shades of Coke and Blackstone—no longer are ye the household deities of the law! One by one the so-called "fundamental" and "basic" principles of the common law seem to be crumbling to decay being supplanted in most cases by rules of the civil law, a system despised by common law judges and which has been steadily gaining the ascendancy both in England and America. Thus, for instance, the common law doctrine of the unity of the marriage relation has for years been struggling unsuccessfully with the civil law principle of the duality of that relation. More recently the great common law doctrine of assumption of risk has been undermined by various state and federal employers' liability acts, which contain a recognition of the modern civil law principle that "the master is responsible for the health and safety of his employe not caused by the latter's willful neglect." (Schusler's Principles of German Civil Law, p. 263.)

The common law doctrine of *caveat emptor* has not escaped similar attack. Little by little it has abandoned its outlying frontiers to the civil law doctrine of *caveat venditor.* First one exception and then another has been made. Thus, if the seller is also the manufacturer, *caveat venditor* and not *caveat emptor* applies; so also, if goods are sold on sample, or by description or for particular, specific uses. The last exception was made only after a bitter struggle and even yet the battle rages, the common law courts refusing to hold a wholesale jobber in food to an implied warranty of wholesomeness although willing to hold the manufacturer to such a warranty, and to some extent the retailer. (Mechem on Sales, 1176.)

But the pure food and drug laws have brushed aside the sophistries of the common law judges with respect to the distinctions above referred to, and have acknowledged full allegiance to the civil law principle that the seller and not the buyer shall bear the burden of determining the identity, fitness and wholesomeness of all foods and drugs offered for public sale or consumption.

In Dunn's Pure Food and Drug Laws, the author in his introduction, says: "The last decade has witnessed a change in governmental attitude toward the sale of food products. Prior to that time the common law maxim, *caveat emptor,* applied to nearly all the transactions in the sale of food products, the theory being that unless the vendor gave a guarantee with his product he was not responsible for its quality. The strife resulting from competition abetted adulteration, so that the consumer was apparently getting less value for his money and in many cases less nourishment than he supposedly was buying. This condition of itself ultimately superinduced the effort that called for a reversal of attitude and finally for an application of the civil law maxim, *caveat venditor.*"

The doctrine of *caveat emptor* is undoubtedly discredited except within very re-

stricted limits. For instance, it certainly should not be held applicable to cases where the buyer expressly or impliedly announces the use to which the article is to be put and where the defect of which he complains was not patent and obvious to him on examination. The decision in the leading case of Shisler v. Baxter, 109 Pa. St. 443, cited in all the books and approved by practically all the courts is an example of the gross injustice to which a strictly logical interpretation of this doctrine often leads. A farmer purchased from defendant a quantity of Wakefield cabbage seed from which he secured splendid results. Next year, naturally wishing to *secure the same results* he asked defendant if he had "any more Wakefield cabbage seed, same as in 1881?" Defendant showed him what remained of his last year's stock and plaintiff bought it. The seed was worthless, but the court held that there was no implied warranty. The defendant knew or should have known that seed deteriorates with age and that seed of a preceding year would not produce as good a crop as fresh seed of the same variety. The fact that the plaintiff examined the seed alone justified the application of the doctrine of *caveat emptor*. But what could a physical examination of seed disclose with respect to its power of germination?

There is undoubtedly a middle ground between the two maxims of *caveat emptor* and *caveat venditor* where lies the true road to justice. What the Supreme Court said in Meyers v. Richards, 163 U. S. 385, 415, in construing a sale made in Louisiana, may be here paraphrased to-wit: That, although it is to be admitted that the civil and common law systems approach the subject of implied warranties from absolutely divergent positions, yet, by the effect of narrowing restrictions in the one case and broadening exceptions in the other, the two systems are, in not a few instances, working "substantially to the same salutary conclusions."

PROSECUTION FOR PERJURY ALLEGED TO HAVE BEEN COMMITTED IN A FORMER CRIMINAL TRIAL IN WHICH DEFENDANT WAS ACQUITTED.

Kentucky Court of Appeals holds that there is nothing in a verdict of acquittal of a defendant in a former trial, which precludes his being prosecuted for perjury alleged to have been committed on such former trial, and in so holding it overturns a rule established by two former cases in that court. Teague v. Com., 189 S. W. 908.

After declaring its unwillingness to follow these former rulings, the court says: "An investigation of this question discloses that with the exception of the Cooper and Petit cases, and the case of United States v. Butler (D. C.), 38 Fed. 498, in which a like ruling was made, the authorities are uniform, that the acquittal in a prosecution aginst a defendant will not bar a subsequent prosecution against him for giving false testimony in the case in which he was acquitted." As supporting the alleged uniform rule, quite an array of cases are cited, among others, State v. Smith, 119 Minn. 107, 137 N. W. 295.

This last cited case seems to us, however, to rule, in principle, just the other way. Thus it held that an acquittal is not a bar to a subsequent prosecution for perjury predicated on testimony given on the former prosecution, unless a conviction for perjury would necessarily import a contradiction of the verdict.

Of the same kind may be thought an Alabama case, which held that an acquittal of burglary is not a bar to a prosecution for perjury, where accused falsely testified that at the time of his arrest he was unarmed. A verdict would not be the necessary upholding of such testimony.

The real question in a case of this kind is whether the perjury prosecution in such a case would be the putting of one twice in jeopardy for the same offense. As we un-

derstand this rule, it is not technical so much as it is comprehensive. What it reaches to by necessary inference, it absolutely embraces.

It is clear that burglary, for example, is a totally different offense from perjury committed afterwards in a defense to the trial. If it is adjudged, by necessary inference, to show, by and through a verdict of acquittal, that there was no burglary, of course there would have been no perjury in pointedly swearing to this effect. If there is conviction, the falsity of defendant's testimony to the contrary might not be absolutely inferred. But is it swallowed up in the verdict?

But, after all, why should the testimony of defendant, when alleged to have been false, differ from that of any witness in a case, whether there resulted a conviction or an acquittal? The only theory occurring to us is that a finding by the jury is *res inter alios acta,* and is a something which binds only the parties to the prosecution. But the truth or falsity of the testimony may by inference be just as much sustained or rebutted by the verdict as had it been the testimony of defendant himself. We know that such a verdict has nothing whatever to do with the prosecution of a mere witness in a former trial. Were such a rule to obtain, the business of prosecution for perjury would be as if it rested on a dead letter of the law.

The rule of jeopardy has, we think, little to do with a subsequent prosecution, because it does not have more than incidental connection with any other offense. There is presented a subsequent event, which aids in no way in the coloring of the prior event. It is in an independent act of the will that neither takes away from nor adds to any quality of the former act nor its defense.

Further than this, it circumscribes in no way the right of defense, because a true defense is to oppose a fact to a charge, not a pretended fact. The finding that something not a fact is a fact is the result not of establishing it as a fact, but to make a conclusion serve as a fact.

Moreover, facts are only to be regarded as facts, when judicially established for the immediate end to which they relate. This is not to say they are to be accepted in a universal way as facts. And when, as the Kentucky court says, they lead to making fraud triumphant, all the more strictly is this principle to be applied. We prefer, however, to base our agreement with the Kentucky court on the rule that willful perjury in a judicial proceeding is punishable for no specific exception is found in that rule as to any offender against it.

In this view we differ from the limitation apparently inhering in the Minnesota and Alabama cases adverted to. It makes no difference that a verdict of guilty for perjury may or not be in square contradiction to the verdict in the former case. If fraud in procurement is not to be rewarded, then it merely may be the more flagrant, if such contradiction is involved. Jeopardy is no more in the case than had the perjured testimony obtained for the party giving it an unjust result in a civil case. His right to property is at stake in the one case, while it is his right to liberty in the other.

NOTES OF IMPORTANT DECISIONS.

ACT OF GOD—INTERVENING NEGLIGENCE SUBJECTING SHIPMENT TO FLOOD.—In Continental Paper Bag Co. v. Maine C. R. Co., 99 Atl. 259, decided by Supreme Judicial Court of Maine, it is declared that the rule held by a great majority of state courts, that a carrier will be held liable where intervening negligent delay causes goods to be in a place where they are destroyed by act of God will not be observed where the shipment comes under the Carmack Amendment, because federal decision is in this opposed to state ruling.

In this case it appears that by the fault of a connecting carrier, the goods for whose value this suit was brought were lost in the Dayton flood of 1913. This fault consisted in the carrier failing to unload the goods promptly on

their arrival and they were damaged while in the carrier's hands. Had they have been promptly unloaded they would not have been injured. The proximate cause of injury was held in accordance with federal view to have been the flood and the carrier was exonerated.

The court in this holding said: "It should not be overlooked that the prime object of the Carmack Amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading and that the principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents. A., T. & S. F. Ry. Co. v. Harold, 251 U. S. 371, 36 Sup. Ct. 665."

Whether the rule as to the law of the place of contract was intended to be changed, so as to make the federal law apply, because of the Carmack Amendment, is, of course, for the federal Supreme Court conclusively to declare. But it does not seem that a merely regulatory statute should be construed to go any further than its plain terms declare. It is not readily discernible that the Carmack Amendment would be at all shorn of its full operation should state law on this subject not be overturned. To construe it as the Maine court does appears to operate as a sort of repeal by implication. There is no specific statement that the law of the place of shipment in interstate commerce shall no longer obtain.

FORMER JEOPARDY—FAILURE TO ARRAIGN, DISCHARGE OF JURY, ITS RECALL AND PUTTING ON DEFENDANT.—The technical claim of former jeopardy appears not to have been allowed in a case tried in New Mexico, where a demurrer was overruled, attention drawn to failure to arraign after jury had been drawn, the forthwith dismissal of the jury, arraignment and then recall of same jury to try the case. Lovato v. New Mexico, 37 Sup. Ct. 107.

The court said: "Under the circumstances there was, in the best possible view for the accused, a mere irregularity of procedure, which deprived him of no right. Indeed, when it is borne in mind that the situation upon which the court acted resulted from an entertaining of a demurrer to the indictment after a plea of not guilty had been entered and not withdrawn, it is apparent that the confusion was brought about by an over cautious purpose on the part of the court to protect the rights of the accused. Whether or not under the circumstances, it was a necessary formality to dismiss the jury in order to enable the accused to plead, the action taken was clearly within the bounds of sound judicial discretion."

It is apparent here, that the accused was arraigned and he had the very jury he agreed to, which presumptively were guardedly kept together, in a sufficient way, by the court. To change the order of procedure, as was done, operated in no way to the prejudice of accused.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACT NOT BASED ON JUDICIAL DECISION.—Consideration of the rule that the contract clause of the federal Constitution does not protect contracts from impairment by the decisions of courts, except where such decisions give effect to constitutions adopted or laws passed subsequently to the date of such contracts, brought a dissent by Justices Clarke and Brandeis to an opinion by the Supreme Court. Detroit United Ry. v. People, 37 Sup. Ct. 87.

In this case it is conceded that a street railway had a right by contract not subject to impairment to charge a five-cent fare in the city of Detroit as it stood at the time the right was granted. When the limits of the city were extended the state court held that this five-cent fare applied to the extended limits. This ruling the Supreme Court reverses by a majority of seven to two.

The majority opinion concedes the rule above stated, but says: "In this case there were state laws passed subsequent to the making of the alleged contracts in question in the form of legislation extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to those subsequent laws. * * * The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impairs the alleged contract rights of plaintiff as they theretofore stood; and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding on plaintiff in error."

The dissenting opinion by Mr. Justice Clarke, concurred in by Mr. Justice Brandeis, says: "The passing of the valid extension act merely created a situation under which the implied condition, *existing in the fare contract from beginning*, finds an application to the new territory. This is giving effect not to the terms of the act of the legislature, but to the terms of

the contract with the city, and the most that can be said against the decision of the Supreme Court of Michigan is that it gives an erroneous construction of the contract."

But it cannot be denied, that Detroit became a different city, so far as this contract is concerned, from what it was at the time the contract was entered into. Therefore the subject-matter to which the contract applied was different. It seems to us that, if the dissent is to be accepted, there might scarcely be a case in which some kind of reasoning could not be employed by a court to avoid application of the rule against impairment of obligation of a contract.

APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR IN MASTER AND SERVANT CASES.

Generally.—The phrase, *res ipsa loquitur*, literally translated, means that the thing speaks for itself, or the thing itself speaks. As used in law, it is merely a way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify the conclusion that the accident was caused by negligence. The inference of negligence is deducible, not from the mere happening of the accident, but from the attendant circumstances.

There seems to be a widely prevalent idea that the relation of master and servant is *per se* inimical to the application of the maxim *res ipsa loquitur*, and that the maxim is one specially designed for cases in which a traveler is injured while on a public highway, or while he is a passenger in the conveyance of a common carrier. This general impression may be due in part to its origin, for it seems to have been applied at first only to cases in which the defendant's contractual obligation to the injured person was practically that of an insurer, and in part to its subsequent extension to actions in which there was no contractual relation between the parties. "It may be fairly surmised, at any rate, that the great preponderance of these two classes of cases in the category to which the maxim has been applied has given rise to the occasional expressions in some of the text-books and decisions, indicating that its application is regarded as depending primarily upon the relation of the person injured to the defendant whom he sues; but, from whatever source this view may have sprung, the fact remains that it is not supported by the maxim itself nor by the decisions of this court."[1]

Although there are numerous cases stating that this rule is not applicable in actions by employes to recover against their employers for injuries received in the course of their employment,[2] the logical and sensible view is that where the facts warrant its application the rule applies in master and servant cases as well as in other classes of cases.[3]

The application of the doctrine does not depend upon the relation of the injured person to the person or party who is charged with causing the injury, but upon the explanatory circumstances which surround the happening of the accident.[4]

It is generally held by the courts which apply the doctrine in master and servant cases that where the evidence of the accident was such as to leave it purely a matter of mere surmise or conjecture whether the injury was due to a cause for which the

(1) Marceau v. Rutland R. Co., 211 N. Y. 203, 105 N. E. 206, 51 L. R. A. (N. S.) 1221.

(2) Kulik v. Adams, 187 Ill. App. 296; Dickason v. Indiana Creosoting Co., 179 Ind. 640, 102 N. E. 1; Missouri, O. & G. R. Co. v. West, ... Okla. ....., 151 Pac. 212 (1915); Armour & Co. v. Harcrow, 217 Fed. 224, 133 C. C. A. 218; Canadian N. R. Co. v. Senske, 201 Fed. 637, 120 C. C. A. 65.

(3) O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674 (1915); Howard v. Chicago & A. R. Co., 179 Ill. App. 380; Marceau v. Rutland R. Co., 211 N. Y. 203, 105 N. E. 206, 51 L. R. A. (N. S.) 1221; Cochran v. Young-H. M. Co., 169 N. C. 57, 85 S. E. 149 (1915); Wyldes v. Patterson, 31 N. D. 282, 153 N. W. 630 (1915); Missouri, K. & T. R. Co. v. Cassady, ... Tex. Civ. App. ....., 175 S. W. 796 (1915); Missouri Valley B. & I. Co. v. Blake, 231 Fed. 417.

(4) Marceau v. Rutland R. Co., 211 N. Y. 203, 105 N. E. 206, 51 L. R. A. (N. S.) 1221; Robinson v. Consolidated Gas Co., 194 N. Y. 37, 86 N. E. 805, 28 L. R. A. (N. S.) 586.

employer is liable the doctrine of *res ipsa loquitur* is not applicable. Under the evidence adduced in the trial of some cases it can as well be said that the injury resulted from a cause as to which the employe assumed the risk, or for which a fellow-servant was responsible, as that it was due to some cause resulting from the employer's negligence.[5] But, it is held, where the evidence is of such a nature as to fairly warrant the inference as a fact, in the absence of explanation, that the accident was due to a cause for which the employer is liable, the doctrine applies.[6]

It appears that the courts apply a stricter rule in their requirements as to what constitutes a *prima facie* case under this doctrine in master and servant cases than they do in cases in which passengers are seeking to recover from common carriers for injuries.[7] This is explained by some by reference to the higher degree of care owed by the carrier to its passengers than is owed by the employer to his employes. This explanation is far from satisfactory, however. The degree of care is immaterial if the accident was due to a cause for which the defendant is not responsible. The higher degree of care imposed on the carrier may broaden the scope of its liability and render it liable in instances in which it would not be liable under an ordinary degree of care, but it is not made an insurer thereby. Its scope of liability is not infinite.

Then, too, the degree of care owed by the defendant has never been stated by any authority as a reason for the application of this doctrine. The reason for the rule is this: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."[8]

If a passenger in the train of a common carrier is injured by the derailment of the train, he makes a *prima facie* case by showing that he was a passenger in the train, that the train was derailed, and that he was injured thereby. As matter of fact the wreck may have been due to any one of a number of causes for which the carrier is not liable. On the other hand, if an employe is injured he must not only show that he was injured by an appliance or place of the employer, but he must exclude the idea that his injury was due to a risk assumed by him—which may have been a risk arising from the negligence of a fellow-servant. If the reason for the application of the rule is present, why compel the employe to go further in his proof than the passenger? If the employe is required to exclude all other sources of the cause of the accident than one for which the employer is liable, why not require the same of the passenger in his action against the carrier?

Again, in many jurisdictions assumption of risk (including the risk of a fellow-servant's negligence), like contributory negligence, is a matter of affirmative defense. Why, then, require the employe to prove that his injury was not due to such a risk in order that this doctrine may apply, when it is not required in other circumstances?

There seems to be no sound reason for refusing a full application of this rule in

(5) O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674 (1915).

(6) O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674 (1915).

(7) "The doctrine of res ipsa loquitur does not apply with the same fullness and weight in cases where the servant is injured by a defective appliance as it does in cases where, for example, a passenger or other person not occupying the relation of servant is injured by an unsafe appliance." Baltimore & O. R. Co. v. Smith, 169 Ky. 593, 184 S. W. 1108 (1916).

(8) Scott v. London Docks Co., 3 H. & C. 596, quoted in I Shear. & Red. on Neg. (6th ed.) § 58b; Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674 (1915), etc.

master and servant cases where the reasons for its application are present and their requirements have been fulfilled. The reason for the reluctance of the courts to apply the rule in such cases is probably due to their inclination in the past to find and apply harsh rules inimical to the employe's interests.

In a New York case it is said that, "If the injured employe sues at common law and seeks to invoke the maxim, he must necessarily make proof of facts and circumstances which, under the common law, exclude every inference except that of the employer's negligence."[10] The court says that this is necessarily true. Why is it true? It is not required of any other litigant. With much solicitude a court will say, as an excuse for not applying the maxim, that "It might have been due to the negligence of a fellow servant." Too many courts have taken this position without reference to the language of the maxim or the reasons for its application. Instead of following the rule, they have offered some excuse (never a reason) for not following it.

That some of the courts would like to avoid the consequences of erroneous precedent is indicated by the following language taken from the opinion in an Ilinois case: "The existence of a rule exempting master and servant cases from the operation of the general principles of the doctrine expressed by *'res ipsa loquitur'* has been doubted and a logical reason for it is difficult often to see; but we are unable to escape from the conviction that it is the settled law of this state."[11]

The Supreme Court of Minnesota lays down a proper rule in the following language: "The doctrine of *res ipsa loquitur* applies, the other conditions to its proper application obtaining, to the occurrence of an injury in the relation of employer and employe, when such injury arises in the use of an appliance which it is the legal and nondelegable duty of the employer to furnish and to keep in a reasonably safe condition for use."[12]

In a Missouri case it is said that, "Where the injury to the servant is traced to a defect in a particular instrumentality or appliance being used by the servant in his work, then there are many cases holding that the proof of the occurrence and its attendant circumstances furnishes sufficient proof of actionable negligence."[13]

On the other hand, the doctrine does not apply when the evidence before the court merely shows the happening of the accident. Negligence is never presumed from the fact only that an accident occurred. It would constitute no case for a plaintiff to say that while he was a passenger in the defendant's train he suffered the injury complained of. The injury may have been self inflicted, or inflicted by a fellow passenger for whose conduct, in the circumstances the carrier was not liable. The circumstances accompanying an accident frequently raise an inference of negligence, but the mere occurrence of the accident never does.

It would be equally nonsensical to say, as some courts have said, that the doctrine in question does not apply at all in master and servant cases.

The following illustrations will give a fair idea of the views entertained by the courts on this subject.

Unexpected Action of Saw or Machine. —The sudden starting of a machine when it should be at rest is evidence of negligence on the part of the employer if unexplained.[14]

(10) Marceau v. Rutland R. Co., 211 N. Y. 203, 105 N. E. 206, 51 L. R. A. (N. S.) 1221.

(11) Kulik v. Adams, 187 Ill. App. 296.

(12) Wiles v. Great N. R. Co., 125 Minn. 348, 147 N. W. 427.

(13) Cody v. Lusk, 187 Mo. App. 327, 171 S. W. 624.

(14) Cullalucca v. Plymouth Rubber Co., 217 Mass. 392, 104 N. E. 956; Dagis v. Walworth Mfg. Co., 213 Mass. 524, 100 N. E. 620; Cook v. Newhall, 213 Mass. 392, 101 N. E. 72,

The plaintiff was employed by defendant to operate a cut-off saw, arranged on two upright timbers which moved to and fro as the saw was operated. When not in use the saw rested in a hood about 12 or 14 inches from the perpendicular, and was drawn forward against the timber to be sawed. At the time in question the saw had been placed back in the hood, and plaintiff was engaged in straightening a piece of timber, when the saw, which should have remained in the hood, unexpectedly sprang forward and injured the plaintiff. It was held that under the doctrine of *res ipsa loquitur* the circumstances raised an inference of negligence on the part of defendant which it was required to explain or disprove.[15]

Without any known cause the arbor next to a saw, about which plaintiff was employed, flew out of the box and the saw fell to the ground, severely cutting plaintiff's foot. It was held that the doctrine did not apply, that there must be some evidence showing what the defect or negligence was that caused the accident.[16]

In an action by an employe to recover for injuries there was evidence that the carriage of the sawing machine, at which he was employel, started up and injured him when it was left at rest with the steam shut off and the lever locked which was used to start and stop it; that a machine which would do that was improperly constructed or adjusted, and was unsafe; that the defendant's foreman knew that the machine had started up in a similar manner three days before the accident. Held, that the jury were warranted in finding that the defendant was negligent.[17]

Explosion of Oil Can.—The rule was held not to apply in a case where a locomotive engineer was injured by the explosion of an oil can which he was filling, because "the accident might have been due to improper handling as well as to improper furnishing the thing causing the accident," and because both the oil and the lamp were in the exclusive control and custody of the plaintiff. "It cannot be said," said the court, "that common experience points more closely to a defect in the oil or lamp attributable to the master than to some carelessness on the part of the servant using it; *prima facie* such negligence will be attributed to the person charged by law with the duty of managing and maintaining the thing causing the injury."[18]

Explosion in Mine.—The plaintiff was employed as a laborer under the orders of a certified miner who, upon inspection after firing a blast, directed plaintiff to go in and break up a large stone thrown out and to hasten. Plaintiff struck the rock a few times and by so doing exploded dynamite or a cap, whereby he was blinded. There was evidence that a careful inspection would have disclosed the presence of the explosive. Plaintiff was a certified miner, but had never worked as such. It was held that the doctrine of *res ipsa loquitur* applied, and verdict for plaintiff was allowed to stand.[19]

Fall of Mine Roof.—In an action by a coal miner to recover for injuries caused by the fall of slate from the mine roof, it appeared that he had been assigned to work on a pillar of coal abutting the entry in question, and had not been there more than 30 minutes; that he had not removed any coal, and that no act of his could have occasioned the fall of slate; and that it fell from the roof directly over him. It was not disputed that it was the defendant's duty to keep the entry in a reasonably safe condition. Held, that the case was properly

(15) Deaton v. Gloucester Lbr. Co., 165 N. C. 560, 81 S. E. 774.

(16) Dingman v. Merrill, 77 N. H. 485, 93 Atl. 664.

(17) Mooney v. Connecticut R. L. Co., 154 Mass. 407.

(18) Courtney v. New York, N. H. & H. R. Co. (D. C.), 213 Fed. 388.

(19) Martinkovics v. Lehigh C. & N. Co. 90 Misc. 185, 154 N. Y. Supp. 178, aff'd in 156 App. Div. 1133.

submitted to the jury under the doctrine of *res ipsa loquitur*.[20]

Fall of Crowbar.—Where the plaintiff was working beneath several carpenters, in the service of the same employer, who were prying up a floor with a crowbar, and the bar fell and struck plaintiff, injuring him, and there was no evidence to show why it fell, it was held that the evidence was sufficient to cast upon the defendant the necessity of explaining; that "unless defendant can account for the fall of the implement in such a way as to exculpate itself it will be held to have done the act negligently."[21]

Fall of Article in Department Store.—The fall of a fire extinguisher in a department store, whereby an employe was injured, the cause of its falling being unexplained, was held not to raise a presumption of negligence on the part of the employer. "From the mere fact that the extinguishers fell from the counter, it cannot be assumed that they were negligently placed or that it was negligence to display them upon a counter. They may have been pushed accidentally by one of the clerks, or even by a passing customer."[22]

Defective Coal Car Brake.—In an action in which it was claimed that the defendant coal company failed to furnish the plaintiff, its employe, with a reasonably safe brake for him to use on a coal-pit car which resulted in his injury, it was held that the doctrine did not apply.[23]

Collision of Handcar and Train.—The mere fact that a handcar, on which the plaintiff, a section hand, was riding with his crew, and a train collided furnished no proof of negligence on the part of the employer, the railroad company. "It is common knowledge that the use of handcars on railroad tracks is not supposed to stop or interfere with trains, but the section men are to keep handcars off when trains approach, and that without any special warning or notice to them."[24]

Roof of Freight Car Blowing Off.—The rule was applied in an action by an employe of a railroad company seeking to recover for injuries sustained when the roof of a box car, in a train of sixteen cars, was blown off by a wind so slight that he had no difficulty in standing on the car, and the roofs of the other cars remained intact. This case arose under the Federal Employers' Liability Act, which takes away the defense of fellow servant.[25]

Sudden Stopping of Train.—Where a section foreman was riding on an empty gravel train in the course of his employment, standing about the center of a flat car, and the train, which was moving 6 to 10 miles an hour, was suddenly and almost instantly stopped, so that he was thrown off the car to the ground and injured, the doctrine was applied. "The train was under the management of defendant's servants, and the instant stop of a train is not an occurrence in the ordinary course of things, if those who have the control thereof use proper care in its operation and with respect to its equipment. In such a case, *in the absence of any explanation* by the defendant, it affords reasonable evidence that the instant stop was due to a want of ordinary care."[26]

Failure of Car Couplers to Couple on Impact.—Under the Federal Safety Appliance Act, which, *inter alia*, provides that it shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used

(20) Main Jellico M. C. Co. v. Young, 160 Ky. 397, 169 S. W. 841.

(21) Johnson v. Metropolitan St. R. Co., 104 Mo. App. 588, 78 S. W. 275.

(22) Grimes v. Strauss, 88 Misc. 23, 150 N. Y. Supp. 105.

(23) Stephanovitch v. Pittsburgh & B. C. Co., 218 Fed. 604, 134 C. C. A. 362.

(24) Lindstrom v. Great Northern R. Co., 129 Minn. 512, 152 N. W. 875.

(25) Ridge v. Norfolk, S. R. Co., 167 N. C. 510, 83 S. E. 762.

(26) Trinity & B. V. R. Co. v. Geary, 169 S. W. 201 (1914).

on its line any car in moving interstate traffic not equipped with couplers coupling automatically by impact, it is held that failure of such couplers to couple on impact raises an inference that the carrier has failed to comply with the standard created by the act.[27]

Miscellaneous.—The rule was held not to apply where the injury to the servant was caused by the falling of a barrel from a stack near where he was working.[28]

Where a servant in a factory was found dying, with his left arm and his neck broken, near an unprotected shaft, but there was no evidence as to the precise way in which the accident occurred, no one having seen it, the questions of the defendant's negligence and decedent's contributory negligence were for the jury.[29]

The breaking of a hook in a crane was held insufficient to raise a presumption of negligence.[30]

It was held not applicable in an action to recover for the death of a workman who was killed by the derailment of a handcar while being transported to work.[31]

The doctrine held not to apply in case of a boiler explosion.[32]

Where the employe made the specific allegation that failure to brace certain posts was the cause of a traveling crane falling on him, the doctrine did not apply.[33]

The doctrine was applied in an action to recover for the death of a locomotive engineer, who was killed when his engine was derailed by running into an open switch.[34]

The pulling out of a draw-bar of a freight train affords a proper basis for the application of the doctrine.[35]

C. P. BERRY.

St. Louis, Mo.

(27) Parker v. Atlantic City R. Co., 87 N. J. L. 148, 96 Atl. 574 (1915).

(28) David v. Clarksville Cider Co., 186 Mo. App. 13, 171 S. W. 594.

(29) Odell M'f'g. Co. v. Tibbetts, 212 Fed. 652, 129 C. C. A. 188.

(30) Guse v. Power & M. M. Co., 151 Wis. 400, 139 N. W. 195.

(31) Rosellini v. Salsich Lbr. Co., 71 Wash. 208, 128 Pac. 213.

(32) Mason & H. Co. v. Feltner, 166 Ky. 254, 179 S. W. 222 (1915), and cases cited in the opinion in that case. The explosion of a boiler while subject to the use for which it was designed is evidence of a defective condition. Souden v. Fore River Co., 223 Mass. 509, 112 N. E. 82 (1916). S. W. 913 (1916).

(33) Hayes v. Berry, 184 S. W. 913 (1916).

(34) Basham v. Chicago & G. W. R. Co., 154 N. W. 1019 (1915).

(35) Wiles v. Great Northern R. Co., 125 Minn. 348, 147 N. W. 427.

CHATTEL MORTGAGE—PRIORITY.

GRAY BROS. v. OTTO, et al.

Supreme Court of Iowa. Dec. 15, 1916.

160 N. W. 293.

A seller of live stock receiving a worthless check in payment is entitled to recover the goods in preference to one holding a pre-existing chattel mortgage on the purchaser's goods owned and to be acquired in the future, who took possession thereunder with knowledge of the seller's equity.

EVANS, C. J. The record is in considerable confusion as to the state of the pleadings. Some of the assignments of error rest upon this part of the record. The material facts in the case are in the main undisputed and the question of merit is simple. In view of the state of the record in this regard it will be more convenient for us to deal first with the question of merit, and afterward with the question of pleading and procedure.

Gray Bros., plaintiffs, were farmers and stockmen. One Claus Rahlfs was engaged in the butcher business at Durant. The defendants, Otto and Trede, were joint mortgagees in a certain chattel mortgage executed by Rahlfs as mortgagor in 1908 and covering all his property, present and future. On October, 1, 1914, Rahlfs bargained with the plaintiffs for the purchase of ten head of cattle. They were delivered the following day by the plaintiffs, who received in payment therefor Rahlfs' check for the full amount of the purchase price. The plaintiffs deposited the check to their own credit other than that upon which it was drawn. It passed through the ordinary course of collection, reaching the bank upon which it was drawn upon October 6th, and was duly pro-

tested for want of funds. Rahlfs had no funds in the bank at the time the check was drawn. On the contrary his account at the bank was largely overdrawn and so continued up to the time of protest. The defendant, Otto, who was a director of the bank, knew of the protest of the check, and knew that it had been given in payment for the cattle in question. He immediately placed the mortgage of the defendants in the hands of a constable and caused possession to be taken under this mortgage of all the property for which the check was given. Four of the cattle had been killed prior to this time, and their carcasses formed a part of the stock in the butcher shop, and were taken possession of by the defendants.

As soon as the plaintiffs learned of the protest of the check they immediately sought to retake their property. They found the same in the possession of the defendants and demanded possession thereof, which was refused. Thereupon they instituted an action of replevin for the six cattle then living, and obtained possession thereof under a writ. Subsequently they amended their petition and claimed the four carcasses or their value; these in the meantime having been disposed of by the defendants. The trial court found in favor of the plaintiff, both for the possession of the living cattle and for the value of the carcasses disposed of. The correctness of this judgment upon the general merits is not fairly open to debate. It is the contention of the appellants in part that the plaintiffs accepted the check in lieu of the cash and that they were bound by such acceptance; that no actual fraudulent intent was shown upon the part of Rahlfs; that the title of the property therefor passed irrevocably to Rahlfs; and that it passed from Rahlfs to the defendants by virtue of the existing chattel mortgage. The law is well settled otherwise. As between the plaintiffs and Rahlfs they had a right to demand back their property upon the dishonor of the check. As a matter of law, the acceptance of the check for the purchase money was tentative only and conditional that it should be honored in due course. See Bellevue Bank v. Security Bank, 168 Iowa 707, 150 N. W. 1076. The cited case deals fully with the authorities on that question. Rahlfs was insolvent and wholly unable to protect the honor of the check. The defendants took the property, not only with knowledge of the equity in favor of the plaintiffs, but also without the knowledge or actual consent of Rahlfs, and without any consideration other than the original consideration of the mortgage with which they had parted six years before. Their right to the possession therefor can rise no higher than that of Rahlfs. Reed Murdoch & Company v. Brown, 89 Iowa 454, 56 N. W. 661, 48 Am. St. Rep. 406. On the question of merit, therefore, the trial court was clearly right in its judgment.

Appellant complains of misjoinder in that the plaintiffs joined in their action of replevin of the six living cattle, the claim for the value of the other four cattle which had been killed and disposed of, such claim being one for conversion. It appears from appellants' abstract that they raised the question of misjoinder by motion filed in the district court. Without waiting, however, for the submission of such motion to the consideration of the court they filed their answer to the merits. In December, 1914, the trial court entered the judgment for the plaintiff on the merits; no ruling having been made or apparently requested on defendants' motion. The filing of the answer before submitting the motion to the consideration of the court was prima facie at least a waiver of such motion.

It is made to appear, however, from appellants' abstract that the defendants filed a motion for a new trial. While the same was pending, the judgment was set aside by the court by agreement of the parties. It is also made to appear that in the meantime the plaintiffs filed their petition in a separate action wherein they claimed to recover the value of the four carcasses. By agreement of both parties also, both cases were tried upon the same evidence. The trial court found for the plaintiffs upon both branches of their claim. Whether a separate entry of judgment was made in each case or whether the findings in both cases were covered by one judgment entry is not clear in the printed record before us. Neither is it made to appear in which of the two cases this appeal was taken.

In view of the fact that under the statute, a plea of misjoinder may be met by a separation of the causes improperly joined, and by a separate docketing of actions therefor, we may fairly presume that this is what was done in this case. We see no fair ground of complaint by the defendants. A full and fair trial was had. The facts were involved in no uncertainty.

The judgment below is therefore affirmed.

NOTE.—*Right of Vendor in Fraudulent Sale Protected Against Mortgage for Pre-existing Debt.*—The instant case in citing Reed, Murdoch & Co. v. Braun, *supra*, cites a case which only decides that a promise to pay for goods fraudulent-

ly obtained by the vendor is not a valuable or sufficient consideration for the transfer as against the real owner. This would be on the theory that no property effectually has passed to the promissor.

In Washburn & Co. v. Donnenberg Co., 117 Ga. 567, 44 S. E. 97, it is said that a vendee obtaining title to property under a sale induced by fraud is the owner until he elects to rescind and a bona fide purchaser without notice of the fraud from the vendee will acquire a good title. The seller's right, however, is superior to that of a mortgagee in a mortgage to secure an antecedent debt. It was said that this doctrine rests in part upon the theory that the debt of the mortgage creditor is not contracted on the faith of the property in possession.

Of course, if mortgage is taken with notice of a fraudulent acquisition of the property, it is clear it cannot give a priority over one defrauded. Tobin v. Allen, 53 Miss. 563. And if a mortgagee permits a mortgagor to retain property, it has been held he gives implied authority for the latter to contract for its repair even to the extent of postponing his lien in favor of a mechanic. Ruppert v. Zang, 73 N. J. L. 216, 62 Atl. 998.

But there is great abundance of authority to the effect that if the consideration of a mortgage is a pre-existing debt, it cannot avail to protect the mortgagee as to property obtained from the owner by fraud. This is the rule recognized by a long line of cases in New York. Woodburn v. Chamberlin, 17 Barb. 446 Van Hensen v. Radcliffe, 17 N. Y. 580, 72 Am. Dec. 480. In New Jersey, Milton v. Boyd, 49 N. J. Eq. 142, 22 Atl. 1078; Missouri, Kemper H. & M. D. G. Co. v. Kidder Sav. Bank, 81 Mo. App. 280; Alabama, Craft v. Russell, 67 Ala. 9; Ohio, Paine v. Mason, 7 Oh. St. 198, 28 Am. Dec. 633, and many other cases the rule is the same.

Indiana, while it recognizes this rule on the theory that to do this deprives the mortgagee of nothing upon which he was induced to create the debt, adheres so closely to the other rule that an extension of the mortgage without notice of the fraud or where any new or additional obligation has been entered into, will change the entire aspect of affairs. Adam M. & A. Co. v. Stewart, 157 Ind. 678, 61 N. E. 1002. It also has been held that this principle does not extend to the case of a vendor selling to vendee and taking a chattel mortgage on the article sold and neglecting to file it for record. Referring to a prior case, it was said: "In that case the mortgagor had obtained possession of the property by fraud; the title as between him and his vendor had never passed." State Bank v. Kelley, 47 Neb. 678, 66 N. W. 619.

It is to be deduced, therefore, that the rule is enforced as one as much of equity as anything else. A mortgagee will not be allowed protection against fraud, where he is not damnified by parting with any present consideration, and when there is no fraud a pre-existing debt will be allowed to operate as parties intend it should operate. C.

BOOK REVIEWS.

HONNOLD ON WORKMEN'S COMPENSATION, VOLS. 1 AND 2.

Mr. Arthur B. Honnold, of the Minnesota Bar, author of a Treatise on Oklahoma Justice Practice, presents a very fine work on Workmen's Compensation Acts in two volumes.

The first volume is devoted to discussion of such acts in a general way and to questions which have called for decision by courts and commissions, well grouped so as to be readily referred to by the investigator. Reference is made to all material English and American cases and the appropriate bearing of rulings is shown in a general and particular way by comparison between different acts.

The second volume shows the text of legislation in the states of this country, as well as the United States itself, the English Act and a Synopsis of the German Act, the two volumes containing more than 1900 pages. The underlying principles in this kind of legislation are in process of formation, but so far have taken on sufficiently definite shape to give a basis for advantageous study to the economist, room for construction to the student lawyer and practical benefit to the practitioner, so many are the instances of construction shown in decided cases.

The work is gotten up in excellent typographical style, the text clear, citation abundant, binding in law buckram and publication by Vernon Law Book Company, Kansas City, Mo., 1917.

DIGEST AMERICAN BANKRUPTCY REPORTS, VOLS. 1 AND 2.

This digest covers all cases reported in American Bankruptcy Reports, Volumes 1 to 35, inclusive. These reports are of all cases in which bankruptcy questions have been touched upon in federal and state reports since the enactment of the National Bankruptcy Act of 1898.

The General Analysis follows the order of division into sections, and the Alphabetical Analysis shows the subjects treated in the syllabi by the various courts. This employment of the two analyses enables the practitioner conveniently to run down any question he desires to investigate.

In addition to these analyses, a table of sections of the bankruptcy act is given and reference made to the reports in which their treatment is considered. Also at the beginning of

each chapter and under nearly all of the sections, cross-references are given.

Future volumes of the Reports will be indexed under this Digest Classification, and thus one using the Index in a separate volume or a case in any particular volume, may from the Digest secure all other cases in point.

This Digest, therefore, should be deemed a virtual necessity to the practitioner in bankruptcy, and its method of arrangement makes of his labor an easy task.

These volumes aggregate just 2000 pages, including table of cases in Volume 2. It is produced in excellent, durable style, with buckram binding, and is published by Matthew Bender & Company, Inc. Albany, N. Y. 1916.

CHAPIN ON TORTS—HORNBOOK SERIES.

This is a very interesting treatment of the law of torts and at the same time very practical. It is by Professor H. Gerald Chapin, Professor of Law in Fordham University and in New Jersey Law School. The author devotes the first part of his work to the principles of law of general application and in the second part he states the rules governing particular torts.

The work is something more than a digest of opinions, but opposing views are given and the author's view is shown as to the correct principle. The style of the writer is clear, his treatment logical, and full, and his citation of authority is abundant and up-to-date.

The work is in one volume of 695 pages, printed on good paper, in excellent typography, bound in law buckram and is published by West Publishing Co., St. Paul, Wis., 1916.

BOOKS RECEIVED.

Handbook of the Law of Torts. By H. Gerald Chapin, LL. M., Professor of Law in Fordham University and in New Jersey Law School. St. Paul, Minn. West Publishing Company. 1917. Price, $3.75. Hornbook Series. Review in this issue.

A Treatise on the American and English Workmen's Compensation Laws, as Interpreted by the Courts and Tribunals Vested with the Power of Administering and Enforcing Same. By Arthur B. Honnold, of the Minnesota Bar; author of a treatise on Oklahoma Justice Practice. In two volumes. Kansas City, Mo. Vernon Law Book Company. 1917. Price $15.00. Review in this issue.

HUMOR OF THE LAW.

James H. Hoyt, a lawyer of Cleveland, and secretary of the Pittsburg Steamships Co., spoke on the relationship of big business with the law. He told a story about a lawyer who was bathing in the surf at Atlantic City. A man-eating shark came up and chased the lawyer to the beach. When he saw he was safe, the lawyer turned around and shawing his fist at the shark, now quietly swimming away, said: "That's the most confounded piece of professional discourtesy I ever experienced."

A newspaper man tells of a communication received by his journal from a newspaperman in Australia seeking information on certain points.

"Dear Mr. Editor," the letter ran, "in your paper, under the heading, 'Election Returns,' appeared the following statement: 'As the count proceeded it became evident that Jones had been scratched repeatedly by the women voters.'

"Inasmuch as the above situation is not clear to me, I beg to ask information on these points:

"Where was the count going?

"Was he German?

"What had Mr. Jones done that the ladies should desire to scratch him?"—*St. Louis Star.*

It is sometimes possible for a lawyer to prove that his opponent is the wiser man, as is evidenced in this case.

A police magistrate in Cleveland was disposing of cases at the rate of about two a minute, with great exactness and dignity, being judge, jury and attorney, all in one.

"Then you are sure you recognize this linen coat as the one stolen from you?" he said to a complainant.

"Yes, your Honor."

"How do you know it is yours?"

"You can see that it is of a peculiar make, your Honor," replied the witness. "That is the way I know it."

"Are you aware, sir," shouted the justice, turning to a closet back of him and producing a similar coat, "that there are others like it?"

"Indeed I am," replied the witness, still more placidly. "I had two stilen."—*Case and Comment.*

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn

1. **Attorney and Client**—Contingent Fee.—Where an attorney, employed in a proceeding for the opening of an avenue upon an agreed contingent compensation of 50 per cent of damages awarded over the amount fixed by city expert, was discharged by his client before completion of the contract, his compensation was limited to the value of the services he had then rendered.—In re Rosedale and St. Lawrence Avenues in City of New York, N. Y., 114 N. E. 49, 219 N. Y. 192.

2.——Officer of Court.—While the relation of attorney and client is that of master and servant in a limited and dignified sense, involving the highest personal trust and confidence, an attorney is also an officer of the court, and is answerable to the summary jurisdiction of the court for failure to discharge his duties to his clients with the strictest fidelity.—Chatham Lumber Co. v. Parsons Lumber Co., N. C., 90 S. E. 241.

3.——Quantum Meruit.—To support a recovery for services rendered by an attorney upon quantum meruit, there must be evidence showing that the services were rendered with some understanding or expectation by both parties that compensation was to be made.—In re Mumford's Estate, Cal., 160 Pac. 667.

4. **Bailment**—Evidence.—Where business agent receipted for bonds in employer's behalf when she acquired them, and they remained in his custody as her agent without any change in the character of his title up to her death, he thereupon became a bailee in behalf of her executor.—People v. Smith, N. Y., 114 N. E. 50.

5. **Bankruptcy**—Allowance of Claims.—A creditor cannot object to allowance of claims of other creditors where he did not move to expunge them and took no exception to decision of referee allowing them.—In re Collins, U. S. D. C., 235 Fed. 937.

6.——Disallowance of Claims.—A claim will be disallowed where proof is made by agent as principal without disclosing agency, for it is false.—In re Collins, U. S. D. C., 235 Fed. 937.

7.——Extortion.—An attorney of a trustee in bankruptcy, who first opposed a bid for the bankrupt's property and compelled bidder to pay him a sum of money to advise acceptance, held guilty of extortion within Bankruptcy Act, § 29b, denouncing the offense of extorting money as a consideration for acting, or forbearing to act, in bankruptcy proceedings.—United States v. Dunkley, U. S. D. C., 235 Fed. 1000.

8.——False Pretenses.—Under federal Bankruptcy Act, § 17, judgment against a bankrupt in favor of a surety company for false representation as to his financial standing in obtaining a bond held not released by his discharge in bankruptcy.—In re Dunfee, N. Y., 114 N. E. 52, 219 N. Y. 188.

9.——Judgment.—A judgment creditor, who secured a decree setting aside as to him conveyances by bankrupt, should not be restrained from levying execution on property, though the decree was obtained within four months of bankruptcy proceedings; other creditors not having participated therein.—In re Betsekas, U. S. D. C., 235 Fed. 1020.

10.——Mechanic's Lien.—Under Bankr. Act July 1, 1898, § 47a, as amended by Act June 25, 1910, § 8, holder of mechanic's lien on property of Bankruptcy Act, § 11 brought suit and required by Civ. Code La. § 3271, cannot assert lien against trustee in bankruptcy.—In re Collins, U. S. D. C., 235 Fed. 937.

11.——Occupation.—The status of an alleged bankrupt as to his occupation is in general to be determined as of the date when the acts of bankruptcy charged were committed.—Harris v. Tapp, U. S. D. C., 235 Fed. 918.

12.——Pleading and Practice.—Alleged Bankrupt held not entitled as of right to dismissal of involuntary petition, though no petitioning creditor appears to press it; the principal of them having after its filing, contrary to spirit of Bankruptcy Act, § 11, brought suit and recovered judgment on his claim in state court, and it having been paid.—In re J. W. Lavery & Son, U. S. D. C., 235 Fed. 910.

13.——Pleading and Practice.—A motion to dismiss is proper means to test sufficiency of petition in bankruptcy.—In re Mason-Seaman Transp. Co., U. S. D. C., 235 Fed. 974.

14.——Practice.—Where other creditors were not parties to petition by trustee for leave to transfer portion of bankrupt's property pursuant to contract made before bankruptcy, such creditors, though they did not appeal from decision of referee wherein he found that one objecting to order had lien on property, are not bound, and may subsequently question objector's interest.—In re Collins, U. S. D. C., 235 Fed. 937.

15.——Priority.—Where five workingmen organized corporation, each paying in a sum of money, one of them, who was treasurer and

director and also labored in the shop, is not, as to his claim for compensation for services rendered as treasurer and director, entitled to priority over corporate creditors.—In re Boston French Range Co., U. S. D. C., 235 Fed. 916.

16.——Public Lands.—Under Bankruptcy Act, § 70a, subdivs. 1, 5, a desert entry, though not completed, is subject to sale by the trustee in bankruptcy, for it might be assigned, and the bankrupt had a right which will be protected by law.—In re Evans, U. S. D. C., 235 Fed. 956.

17.——Statutory Construction.—The Bankruptcy Act should receive a construction which will effectuate its purpose, and not permit debtors to retain their property free from the claims of creditors.—In re Evans, U. S. D. C., 235 Fed. 956.

18.——Trustee.—Trustee in bankruptcy held entitled to recover money of payee of bankrupt's check in good faith given and deposited for collection before, but not paid till after, filing of petition in voluntary bankruptcy.—In re Howe, U. S. D. C., 235 Fed. 908.

19. **Banks and Banking**—Scope of Agency.—Where cashier of a bank, who was president of a lumber company and authorized to draw checks for it, directed making of entries on the books of the bank covering sums taken from the lumber company's account, held, that he did not bind the lumber company, but bound the bank; no check being drawn.—Citizens' Trust Co. v. Mullinix, U. S. C. C. A., 235 Fed. 875.

20. **Bills and Notes**—Burden of Proof.—In an action on an unindorsed note, payable to a third person, defendants' answer that the note was executed in consideration of a conveyance of lands by plaintiff admitted plaintiff's ownership of the note, and no proof is necessary, though it was denied by the answer.—Choate v. Stander, Okla., 160 Pac. 737.

21.——Collateral.—Under the uniform negotiable instruments law, where a note was assigned as collateral security for a note and indebtedness then made, the assignee became a holder for value of the assigned note, and it was thereby freed of any defenses existing as between maker and payee.—First Nat. Bank of Iowa City v. John McGrath & Sons Co., Miss., 72 So. 701.

22.——Indorsement.—The purchaser of a negotiable note indorsed, "Payment guaranteed. Protest waived," held an "indorsee" within the rule protecting an innocent purchaser against defenses.—Mangold & Glandt Bank v. Utterback, Okla., 160 Pac. 713.

23.——Recoupment.—Damages which might have been recouped by the maker of a note in an action by the original payee may be recouped against a mere assignee.—Emerson-Brantingham Co. v. Brennan, N. D., 159 N. W. 710.

24. **Boundaries**—Meanders—Where the line traced by a surveyor can be fixed by reference to meander calls of a river which has since changed its course, the contention that a call of a subsequent survey must be determined by the present course of the river, cannot be sustained.—Maddox v. Dayton Lumber Co., Tex., 188 S. W. 958.

25.——Monuments.—That a stone claimed by plaintiff to be corner of his property was one procured for the purpose and securely placed in the ground, as the corner called for in his deed at time land was surveyed, for purpose of making the deed, would give it such elements of identification and permanence as to constitute an artificial monument of boundary.—Nelson v. Lineker, N. C., 90 S. E. 251.

26. **Brokers**—Commission.—Where defendant employed plaintiff to lease her realty, agreeing to pay $2,500 commission "along during the first year," and she refused to lease at all, and repudiated her liability for commission, plaintiff, having procured prospective lessees on acceptable terms, was entitled to recover full commission.—Merwin v. Shaffner, Cal., 160 Pac. 684.

27. **Carriers of Goods**—Conversion.—Where fruit consigned to shipper, another to be notified, is rejected by the latter, the carrier is liable in conversion if it sells the fruit without notifying the consignor, if practicable; notice to the "notify party" not being sufficient under Rev. St. 1909, § 3113.—F. W. Brockman Commission Co. v. Missouri Pac. Ry. Co., Mo., 188 S. W. 920.

28.——Lex Loci Contractus.—Law of the place where a contract for shipment of goods is made must, in absence of proof of contrary intention of parties, be looked to for creation of obligations imposed by and interpretation of any rights arising out of it.—Model Mill Co. v. Carolina, C. & O. Ry. Co., Tenn., 188 S. W. 936.

29.—Vis Mejor.—Where martial law was declared in a flood district and at the suggestion of the carrier a shipment of chickens was appropriated by the military authorities, the carrier, having caused appropriation, cannot defeat recovery by the shipper on the ground that there was a confiscation.—Chicago & E. I. R. Co. v. Collins Produce Co., U. S. C. C. A., 235 Fed. 857.

30. **Carriers of Passengers**—Sudden Starting of Trains.—Where a passenger, his station being announced and train slackening speed, goes upon steps and on sudden starting of train, with unnecessary violence, is thrown from car and injured, carrier cannot as a matter of law be declared free from liability.—Spiesberger v. Michigan Cent. R. Co., U. S. C. C. A., 235 Fed. 864.

31. **Charities**—Bequest.—A bequest of the income of an estate, to be paid to a fraternal order annually, if within five years from testator's death it established an orphans' home, the income to be used to maintain the home, held not void as imposing upon the order no imperative duty to devote the money to a charitable use.—In re Hartung's Estate, Nev., 160 Pac. 782.

32.——Hospital.—A hospital organized and maintained with funds donated, caring for all sick and injured persons brought to it, charging those who are able to pay and treating free of charge those who are not, operated under a board of trustees consisting of the Protestant Episcopal bishop and the rector and church wardens, is a charitable institution.—Bishop Randall Hospital v. Hartley, Wyo., 160 Pac. 385.

33. **Commerce**—Initial Carrier.—Icing a refrigerator car to receive fruit for another state is an initial movement after which, in switching, the car is engaged in interstate commerce, so as to permit an injured brakeman to recover under federal Employers' Liability Act.—Aldread v. Northern Pac. Ry. Co., Wash., 160 Pac. 429.

34.——Interstate Commerce.—Sale of goods by foreign corporation and its representatives through mail orders, temporary show rooms, etc., constituted interstate commerce not subject to Ky. St. § 571, imposing penalty for failure to designate office in state and agent thereat to accept process.—Larkin Co. v. Commonwealth, Ky., 189 S. W. 3.

35.——Intoxicating Liquors.—Despite rulings under Wilson Act, held, that intoxicating liquors consigned to shipper with directions to notify another are subject to state laws where retained by carrier for an unreasonable time; a constructive delivery being presumed.—Charleston & W. C. Ry. Co. v. Gosnell, S. C., 90 S. E. 264.

36. **Corporations**—Assignment.—President and general manager of corporation engaged in mining and selling coal, in absence of any limitation on their authority, have power to assign an ordinary open account to a creditor of the corporation.—Kentucky Consumers' Oil Co. v. Continental Fuel Co., Ky., 188 S. W. 855.

37.——Presumption.—It will be presumed that corporate stock registered in the name of deceased belonged to him.—Rasmussen v. Sevier Valley Canal Co., Utah, 160 Pac. 444.

38.——Respondeat Superior.—Corporation selling surgical and medical appliances and diagnosing and prescribing for persons suffering with injured or deformed feet or limbs held responsible for employe's indecent treatment of patient during his examination of her.—Stone v. William M. Eisen Co., N. Y., 114 N. E. 44, 219 N. Y. 205.

39. **Curtesy**—Initiate.—The birth of issue capable of inheriting as a requisite to an estate by curtesy is satisfied if the child is alive for only a moment of time; the word "alive" meaning that the child be alive and have an independent life of its own for some period after birth.—Fleming v. Sexton, N. C., 90 S. E. 247.

40. **Deed**—Description of Property.—Where specific description of property did not convey land involved in an action, general description, following warranty, and referring to record of conveyances in grantor's chain of title covering the land involved, would be given effect and considered as a more particular description.—Quelch v. Futch, N. C., 90 S. E. 259.

41.——Evidence.—An heir, after the grantor's death, may proceed on the ground of fraud, duress, or want of mental capacity to recover the granted land on the ground that the contract was such that while the land was in the hands of the grantee, the title never passed, and there is no necessity of revesting the title.—Adkins v. Adkins, Ky., 188 S. W. 843.

42. **Descent and Distribution**—Assumption of Debt.—Heirs who accepted unconditionally the succession of their mother without benefit of inventory assumed her obligations under an extension of a mineral lease entered into while she was the owner of one-half and usufructuary of the other half.—Cochran v. Gulf Refining Co. of Louisiana, La., 72 So. 718.

43. **Druggists**—Indictment and Information.—An indictment under Burns' Ann. St. 1914, § 2494a, for illegal sale of cocaine, is not bad because not distinguishing between "cocaine alpha," and "beta cocaine," because such section following an error in punctuation in Acts 1913, c. 118, amending Acts 1911, c. 27, forbade the sale of "cocaine alpha, and beta cocaine;" it omitting the comma between the words "cocaine" and "alpha."—King v. State, Ind., 114 N. E. 34.

44. **Eminent Domain**—Taking.—The construction and operation of a steam railroad on a street is an additional burden and constitutes a physical interference with the proper enjoyment of his easement by an abutting owner which amounts to a "taking."—Caveness v. Raleigh, C. & S. R. Co., N. C., 90 S. E. 244.

45. **Gifts**—Separate Property.—A married man may during his lifetime give away his separate property, and such gift will be valid against his widow, where she is not a creditor within the statute against fraudulent conveyance.—Garrison v. Spencer, Okla., 160 Pac. 493.

46. **Highways**—Negligence.—Where the driver of a motor-car was proceeding at a reckless rate of speed and though signaled did not slacken or stop, but drove so close to a wagon and team that he struck the teamster, who was walking beside his team to control them, the motorist was guilty of negligence, rendering him liable, particularly as he was violating one of the penal laws of the state.—Gardner v. Vance, Ind., 113 N. E. 1006.

47.——Nuisance.—Erection of a gate across a public highway which the public must open and close is a nuisance, and no prescriptive right can be acquired to maintain such gate.—Hansen v. Green, Ill., 113 N. E. 982.

48.——Unlicensed Driver.—Although plaintiff, owning a motor passenger truck operated for hire failed to register his machine, as required by Ky. St. § 2739, subsec. 2, and employed an unlicensed chauffeur in violation of subsection 24, such facts having no causal connection with a rear-end collision, he was not precluded from recovery for injuries received due to such collision.—Moore v. Hart, Ky., 188 S. W. 861.

49. **Homestead**—Partition.—Where a widow, owner of an undivided one-half interest in a lot, also had right of homestead therein, the homestead cannot be sold for partition, so as to require her to surrender possession without full payment of the amount of $500.—Grote v. Grote, 113 N. E. 967.

50.——Remainderman.—A second husband, though living with his wife on the homestead acquired from her first husband, and though acquiring the remainder interests of the first husband's children, has no homestead right therein.—Kulbreth v. Drew County Timber Co., Ark., 188 S. W. 810.

51. **Husband and Wife**—Abandonment.—Misconduct of wife after abandonment affords no excuse for the abandonment, though misconduct after marriage and before abandonment would do so.—Gobel v. State, Ala., 72 So. 756.

52.——Public Policy.—Agreement between husband and wife while living together as such, in contemplation of separation, whereby husband agreed to pay wife certain amount per month in full satisfaction of her support and maintenance, with release from further liability therefor, was void.—Winton v. Winton, N. Y., 161 N. Y. Supp. 405.

53. **Injunction**—Penal Ordinance.—A court having equitable jurisdiction will not, on petition for injunction, inquire into validity of penal ordinance.—Jones v. Carlton, Ga., 90 S. E. 278.

54. **Insurance**—Forfeiture.—A life policy without qualifying provisions is not a contract of insurance for a single year with a privilege of renewal from year to year, but is an indivisible continuous contract of insurance subject to forfeiture for nonpayment of premium.—Friend v. Southern States Life Ins. Co., Okla., 160 Pac. 457.

55.——Limitation of Time.—Where, under terms of death benefit certificate beneficiary had no right to sue until advised that insurer rejected her demand, the period limited by certificate within which she must bring suit did not begin to run until so advised.—Simmons v. Modern Woodmen of America, Mo., 188 S. W. 932.

56. **Intoxicating Liquors**—Assisting Sale.—In prosecution under Acts 1915, p. 98, for selling liquor, defendant, if acting simply as intermediary to receive cash at place of sale and take to his sister would not be assisting in the sale, but if assisting in the business by checking up the accounts, etc., he would be assisting in sale.—Marsh v. State, Ark., 188 S. W. 815.

57.——Illegal Sales.—Evidence that money passed and whisky was delivered as a single transaction is sufficient to support a conviction of illegal sale of whisky.—Cowart v. State, Ga., 90 S. E. 286.

58.——Injunction.—The maintenance of a wholesale liquor house will not, where it was conducted in accordance with law, be enjoined because customers misconducted themselves at places away from the house.—State ex rel Alton v. Moffett, Mo., 188 S. W. 930.

59. **Libel and Slander**—Implied Malice.—Charge imputing hereditary predisposition to insanity, and that plaintiff has done things indicating impending insanity, is defamatory and libelous per se, from which malice is ordinarily inferable.—McClintock v. McClure, Ky., 188 S. W. 867.

60. **Licenses**—Burden of Proof.—Ordinance imposing license fee of $1 for each telegraph pole in public streets would be presumed to be valid, and the burden was upon defendant telegraph company to allege and prove that it was unreasonable because providing for an excessive license fee, etc.—City of Peoria v. Postal Telegraph-Cable Co., Ill., 113 N. E. 968.

61. **Lotteries**—Evidence.—In prosecution for aiding and abetting a violation of lottery statute (Burns' Ann. St. 1914, § 2464), evidence that accused sold certain cards that could be used for the operation of a lottery, but not showing that accused ever had part in a lottery operated by their use, or that any lottery was conducted by their use, was insufficient to convict.—McDaniels v. State, Ind., 113 N. E. 1004.

62. **Master and Servant**—Contributory Negligence.—Where switchman, engaged in setting brakes on stationary car, was thrown therefrom by impact of three cars which he knew the foreman was about to push other cars against, railroad was not liable for his death unless the impact was so violent as to constitute negligence.—Anderson v. Texas & P. Ry. Co., La., 72 So. 751.

63.——Illegitimate Child.—Where an illegitimate son, adopted by his mother and her husband, paid board of and supplied money to their child while boarding with strangers, and maintaining no household, during life of the father, she was not a member of his family within Workmen's Compensation Act, § 2, nor a dependent, and could not have compensation on his death.—In re Cowden, Mass., 113 N. E. 1036.

64.——Safety Appliance Act.—Since federal Employers' Liability Act governs rights of the parties employed in interstate commerce, a servant so injured is entitled to benefit of a showing of the master's negligence without showing violation of federal Safety Appliance Act.—Aldread v. Northern Pac. Ry. Co., Wash., 160 Pac. 429.

65.——Safe Place to Work.—A railroad is not liable for death of its engineer due to ice on right of way where he stopped to repair the engine, on the theory of failure to provide a safe place to work, since he and not the railroad chose the place for work.—Judd's Adm'x v. Southern Ry. Co., Ky., 188 S. W. 880.

66.——Workmen's Compensation Acts.—Under Workmen's Compensation Act, held that original application for compensation for death of a servant, which complied with form prescribed by commissioner save as to signature, together with subsequent application by servant's dependent, which because of dependent's foreign residence was not filed within the six months fixed, constitute valid application.—Culurides v. Ott, W. Va., 90 S. E. 270.

67.——Workmen's Compensation Act.—A salesman of a manufacturer of machinery, whose duty includes inspecting machinery set up, in doing which he is injured by it, held employed in "manufacture" of machinery, classified by Workmen's Compensation Law under section 2, group 20, as hazardous employment.—Benton v. Fraser, N. Y., 114 N. E. 43, 219 N. Y. 210.

68.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 24, an original claim for compensation before any payments have been made need not be in writing.—Suburban Ice Co. v. Industrial Board, Ill., 113 N. E. 979.

69.——Workmen's Compensation Act.—The requirement of section 24 of the Workmen's Compensation Act of 1913 that claims for compensation thereunder be presented within six months is mandatory, and mistake as to the true employer is no excuse for failure to conform to it.—Haiselden v. Industrial Board of Illinois, Ill., 113 N. E. 877.

70.——Workmen's Compensation Act.—Under Workmen's Compensation Act, §§ 24, 31, failure to give notice of an accident to the principal contractor does not defeat its liability to an employe of the subcontractor if its foreman and general superintendent had knowledge of the accident.—Parker-Washington Co. v. Industrial Board, Ill., 113 N. E. 976.

71.——Workmen's Compensation Act.—Workmen's Compensation Act, § 31, makes a contractor liable for compensation to the employe of a subcontractor if he either fails to require security of the subcontractor or enters into a fraudulent scheme to avoid liability for compensation.—Parker-Washington Co. v. Industrial Board, Ill., 113 N. E. 976.

72. **Municipal Corporations**—Discretion.—An ordinance requiring two water mains in a street which will probably be used for a street car line cannot be said to be so unreasonable as to constitute an abuse of discretion by the council or an arbitrary imposition of an unjust burden upon the owners of property.—City of Chicago v. Hirschl, Ill., 113 N. E. 899.

73.——Evidence.—That defendants, sued for driving into a person, were on the wrong side of the street because of an excavation, and desired to deliver to house there, is not new or affirmative matter required to be alleged in the answer, but is admissible under the general issue.—White v. Shipley, Utah, 160 Pac. 441.

74.——Jitney Busses.—Provision in New Orleans ordinance, requiring operators of jitney busses and street cars to furnish surety bond

of $5,000 per vehicle, held not invalid as discriminatory in favor of street cars.—Lutz v. City of New Orleans, U. S. D. C., 235 Fed. 978.

75.——Temporary Use.—A city can temporarily use as a garage a portion of the property acquired for a market, but not then needed.—Neil v. Kansas City, Mo., 188 S. W. 919.

76. **Railroads**—Evidence.—Though railroad company's servants positively testified the bell was rung for the crossing, testimony by plaintiff that his hearing was good and that he did not hear the bell, raises question for jury; credibility of witnesses being for jury.—Callison v. Charleston & W. C. R. Co., S. C., 90 S. E. 260.

77.——Pedestrians.—Rule permitting train to be run in country at high speed without imputation of negligence does not obtain when operated through populous cities and over much-traveled crossings, but railroad owes to pedestrians duty of ordinary care.—Chicago & E. R. Co. v. Biddinger, Ind., 113 N. E. 1027.

78.——Respondeat Superior.—A watchman employed to arrest any depredator in railroad yards, negligently mistaking for such an innocent and rightful traveler, and assaulting him, was acting within his employment, rendering the employer liable.—Baker v. Ives, Tex., 188 S. W. 950.

79. **Sales**—Fraud.—Representations by a sewing machine agent to purchaser that an order contained certain agreements which were not included therein, though the cause moving the purchaser to sign the contract, do not constitute fraud in its procurement.—White Sewing Mach. Co. v. McCarty Furniture Co., Okla., 160 Pac. 495.

80.——Sample.—Purchaser of goods by sample has the right to inspect them on arrival and before payment of the seller's draft, and without production of the bill of lading, to ascertain whether they correspond to sample, and, if not, to refuse to take them.—Model Mill Co. v. Carolina, C. & O. Ry. Co., Tenn., 188 S. W. 936.

81. **Specific Performance**—Right of Action.—Vice-president of rubber company, active in its reorganization, who had contract of employment for five years as general sales agent, held not to have special property interest in business entitling him to specific performance of contract of employment by injunction restraining company and other officers from breaking it.—Auerbach v. Northland Rubber Co., N. Y., 161 N. Y. Supp. 396.

82. **Street Railroads**—Evidence.—In an action for injuries received by a woman who was attempting to pass through a turnstile leading from the tracks of the defendant electric railroad company, evidence that about a week after the accident it was found that the turnstile had sunk, so that it would not revolve, held inadmissible despite objections of remoteness.—Tacoma Ry. & Power Co. v. Cothary, U. S. C. C. A., 235 Fed. 872.

83. **Telegraphs and Telephones**—Public Utility.—A farmers' mutual telephone company, operating in connection with a commercial telephone company, and ready to serve any citizens wishing to construct lines to its exchange, was a public utility, and subject to the control of the Public Utilities Commission, under Public Utilities Act, § 10.—State Public Utilities Commission v. Noble, Ill., 113 N. E. 910.

84. **Trusts**—Resulting Trust.—A trust will not result to one who pays a part only of the purchase money of land conveyed to another, unless it be some definite part of the whole consideration, and can only arise from the original transaction.—Briscoe v. Price, Ill., 113 N. E. 881.

85. **Vendor and Purchaser**—Constructive Notice.—Record of mortgage, certificate of acknowledgment of which fails to name acknowledging party, where reference is made in certificate to executing party, is sufficient to impart constructive notice to subsequent purchaser.—Coates v. Smith, Ore., 160 Pac. 517.

86.——Lien.—The right to enforce a vendor's lien for partial failure of consideration, resulting from vendor's reliance on false representations of the vendee, may exist contemporaneously with a right to recover at law.—McTernan v. Mason, Mo., 188 S. W. 923.

87.——Option.—Where an instrument asserted by plaintiffs to be an option, and by defendants to be a contract of sale, contained a clause excepting timber over 14 inches in diameter if the grantee should accept the contract, the only condition for acceptance being merchantable title, it was a contract of sale and not an option.—Bowling v. Bowling, Ky., 188 S. W. 1070.

88.——Rescission.—A vendor's contract guaranteeing construction of a street car line in the addition within two years is not a future collateral promise, but a warranty, and the purchaser may rescind for breach thereof.—Aurand v. Perry Town Lot & Improvement Co., Iowa, 159 N. W. 779.

89. **Weapons**—Unlawful Carrying.—A pistol behind the front cushion of a jitney driver's automobile on which he sat to drive his car was carried "about the person" within the statute.—Wagner v. State, Tex., 188 S. W. 1001.

90. **Wills**—Devise.—A devise of "what money I have in the bank" does not include proceeds of a policy of life insurance in which testator had a vested interest.—Mutual Life Ins. Co. of New York v. Spohn, Ky., 188 S. W. 1078.

91.——Identifying Beneficiary.—Though a devise did not name the beneficiary, it is not necessarily void, and it is proper to direct the administrator to make necessary investigations to ascertain the name of the beneficiary, where there is description by which he may be identified.—Hills v. Atlanta Art Ass'n., Ga., 89 S. E. 1084.

92.——Intent.—While the words "in the distribution of my estate" indicate a disposition of personalty, the language is not controlling as to the testator's intent, particularly where in a prior reference the real property was indicated.—Albright v. Albright, N. C., 90 S. E. 303.

93.——Latent Ambiguity.—Where at time of making will testator owned 20 shares of stock, par $2,000, actual $5,000, and the devise read, "I bequeath my stock amounting to $1,000," extrinsic facts were admissible to remove the latent ambiguity.—Hertford v. Harned, Ind., 113 N. E. 727.

94.——Seal.—Affixing colored seal, with initials of testator and the word "Seal" written thereon, intended by the testator as a signature, held a sufficient compliance with the statute of wills.—In re Severance's Will, N. Y., 161 N. Y. Supp. 452.

95.——Undue Influence.—Findings by the jury that testatrix was enfeebled by old age and sickness and partial paralysis at the time of execution of will, but did not act under influence amounting to coercion, and understood the business in which she was engaged, authorized a judgment sustaining the will.—Hladky v. Hladky, Kan., 160 Pac. 992.

96.——Vested Interest.—Will bequeathing estate in trust to testator's daughter for life, then to her children and the issue of such children, held to pass a vested interest to a child of the daughter living at testator's death to which the daughter succeeded under intestate laws, on the child's dying without issue before her.—In re Rau's Estate, Pa., 98 Atl. 1068.

97. **Witnesses**—Competency.—Where a wife and mother died, leaving a husband and children of the marriage, and the husband sued to quiet his title to land, which at the time of her death was vested in the wife, children of the marriage are competent to testify against the father.—Shipley v. Shipley, Ill., 113 N. E. 906.

98.——Cross-Examination.—Where accused has put his character in issue, it is permissible on cross-examination to inquire of his witnesses if they had not heard of reports in the community of the defendant's residence, before the alleged criminal act, derogatory to his good character.—Stout v. State, Ala., 72 So. 762.

99.——Impeachment.—In action on assigned claim for commissions for selling phonographs, where salesman's honesty and veracity were sharply in issue and of controlling importance, refusal to permit defendant to impeach him on cross-examination, by asking whether he had failed to turn over money collected in previous employment, held erroneous.—Harris v. Landay Bros., N. Y., 161 N. Y. Supp. 27.

100.——Interest.—Where defendant claimed an estate by curtesy, the defendant and a nurse present at alleged birth of issue were not disqualified to testify by interest, which goes to weight of evidence and not to competency of witnesses.—Fleming v. Sexton, N. C., 90 S. E. 247.